Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 34(a)(1)	)	
of the Public Utility Holding Company	)	GC Docket No. 96-111
Act of 1935, as added by the	)	
Telecommunications Act of 1996	)	

COMMENTS OF BELLSOUTH

BELLSOUTH CORPORATION
BELLSOUTH TELECOMMUNICATIONS, INC.

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Summary

In this docket, the Commission proposes a straight-forward procedure for determination of ETC status. BellSouth endorses the approach taken by the Commission in this rulemaking and encourages it to adopt this approach in other rulemakings arising in connection with the 1996 Act.

BellSouth recommends that the Commission use the entry of ETCs into the telecommunications market to as an opportunity to eliminate antiquated cost allocation regulations and to reinvigorate its efforts to eliminate time-consuming and outdated reporting requirements applicable to LECs. In an age where LECs like BellSouth are subject to Price Cap regulation, the existing LEC cost allocation procedures required by the Commission are no longer justified.

Congress has charged the Commission with the task of eliminating unnecessary regulation. In order to fulfill this responsibility, the Commission must require that all telecommunications providers, including LECs and ETCs, provide objective information concerning the status of competition in the telecommunications businesses and markets in which each is active. Other than the provision of information necessary for the Commission to meet its obligations under the 1996 Act, ETCs and LECs should not be burdened with many of the myriad of reporting and filing requirements currently applicable to LEC activities.

The rules proposed by the Commission in this docket should be modified to provide that an ETC must actually engage in the provision of telecommunications services within a reasonable period of time following grant of ETC status. Such a requirement

furthers Congress' intent to encourage facilities-based competition in the telecommunications market. The rules should also require that applicants provide sufficient information about their telecommunications activities to enable interested parties to provide constructive comment and to facilitate the Commission's review of the application. The rules should be further amended to provide interested parties with a reasonable period of time to comment on any "changed circumstances". Finally, any entity which is or has been granted ETC status based on an application filed prior to the effectiveness of the rules should comply with the "changed circumstances" filing requirements.

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Implementation of Section 34(a)(1)	)	
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Act of 1935, as added by the	)	
Telecommunications Act of 1996	)	

COMMENTS OF BELLSOUTH

BellSouth Corporation and BellSouth Telecommunications, Inc. (collectively "BellSouth") hereby comment on the issues identified in the Notice of Proposed Rulemaking ("Notice"), FCC 96-101, released April 25, 1996.

I. INTRODUCTION

In the Notice, the Commission proposes rules ("Rules") pursuant to which entities affiliated with public utilities holding companies ("PUHCs") may be granted "exempt telecommunications company" ("ETC") status. In large part, the Rules simply incorporate the provisions of Section 103 of the Telecommunications Act of 1996 ("1996 Act" or "Act").[1] According to the Commission, this approach is appropriate because of its view "that its responsibilities under section 34(a)(1) are limited to whether the applicant meets

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[1] Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996). Section 103 of the Act added a new Section 34 to the Public Utility Holding Company Act of 1935 ("PUHCA"), 15 U.S C. 79, *et seq.*

the express statutory criteria for ETC status."[2] Otherwise, the Commission writes, these rules would constitute a barrier to entry, contrary to Congress' policy of allowing "[PUHCs] to become vigorous competitors in the telecommunications industry in order to promote the public interest."[3]

BellSouth is in full agreement that the Commission should not erect barriers to entry and competition in the telecommunications industry. In fact, BellSouth welcomes competition and the opportunities which it presents for innovation in and expansion of the telecommunications market. BellSouth endorses the Commission's approach in adopting narrow and focused rules in connection with the requirements of Section 103 of the Act rather than promulgating exhaustive rules, unnecessarily regulating an industry which is poised at the beginning of a new era of "regulation through competition".[4]

The entry of PUHCs into the telecommunications industry offers the Commission a unique opportunity to take a major step towards regulatory reform to facilitate a full enjoyment of the benefits of an increasingly competitive industry. As the Commission noted in the Notice[5], PUHC's are mostly large companies with substantial assets which will be brought to bear to create formidable competitors. Entry by these entities is strong evidence that telecommunications markets are becoming more and more competitive.

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[2] Notice, ¶ 2.

[3] Id.

[4] See Comments of BellSouth, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Notice of Proposed Rulemaking (released April 19,1996), filed May 16, 1996, in which BellSouth advocated an approach similar to the approach taken by the Commission in this Notice.

[5] See Notice at ¶ 7

This increased competition must lead the Commission to reduce existing regulation, and not to the imposition of additional regulatory restraints. Entry into the telecommunications market by these large and powerful PUHCs necessitates Commission action to ensure that local exchange carriers ("LECs") do not have their hands tied behind their backs in competing with ETCs. The Commission must create and foster an environment of "regulatory parity".

BellSouth does not advocate the application to ETCs of unnecessary and inefficient regulation simply because such regulation is applicable to LECs. Rather, within the confines of the requirements of the 1996 Act, BellSouth advocates freeing up the entire industry to compete in an open and fair manner. Section II of these Comments sets forth BellSouth's view with respect to certain areas in which the Commission should act to move towards regulatory parity.

Notwithstanding BellSouth's agreement with the Commission's approach in proposing the Rules, there are certain aspects of the Rules which BellSouth believes should be revised. Section III of these Comments sets forth BellSouth's views with respect to areas in the Rules which require amendment.

II. THE COMMISSION'S ROLE

A. Regulatory Parity.

The entry of PUHCs into the telecommunications marketplace offers significant opportunities for the public in the form of increased competition. However, entry by these

large, resource rich entities[6] could have the undesired effect of skewing competition if the Commission and State commissions fail to adopt an approach of regulatory parity. Section 34(n) of the PUHCA provides that none of the changes effected by the new Section 34 "shall affect the authority of the [Commission] under the Communications Act of 1934, or the authority of State commissions under State laws concerning the provision of telecommunications services, to regulate the activities of an exempt telecommunications company". Section 34(j) also provides that the Federal Energy Regulatory Commission ("FERC") and State commissions will retain their jurisdiction over recovery of costs for assets and services sold to an affiliate ETC.[7]

The Commission and the State commissions are the appropriate expert agencies for regulating telecommunications services, for as long as such regulation remains appropriate. The Commission and the State commissions should exercise and assert their jurisdiction over these activities. Other agencies, such as the Securities and Exchange Commission ("SEC") and the FERC, should not be required to extend their jurisdiction

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[6]For example, in 1995, The Southern Companies had total operating revenues in excess of $9,000,000,000 and assets valued at over $30,000,000,000. These revenues were generated by over 3,500,000 customers. Included in its businesses is Southern Communications which provides digital wireless communications services to the other operating companies and to the public within the Southeastern United States. See The Southern Companies, 1995 Annual Report to Shareholders. Entergy Corporation had 1995 operating revenues of over $6,200,000,000 generated by its more than 2,400,000 retail customers. Entergy has plans to commercialize its 1000-mile fiber optic telecommunications network as a result of the relief granted by the 1996 Act. See Entergy Corporation, 1995 Annual Report to Shareholders. These are only two of the numerous PUHCs which are now free to compete with BellSouth in the southeastern United States.

[7] See PUHCA, §§ 34 (j) and (n).

and develop expertise in these areas. The FCC and the State commissions have a long history of investigation and oversight in the area of telecommunications.

BellSouth does not advocate broad regulation of ETCs. Rather, BellSouth believes that the appropriate approach for the Commission and State commissions is to create an environment of regulatory parity by reducing the regulatory burden on LECs and imposing only an equivalent level of regulatory requirements on the activities of the ETCs. The result of this approach will be that fair and open competition will be possible. Artificial impediments to competition will unfairly benefit ETCs at the expense of LECs and the public. As set forth below, it is essential that price cap LECs[8] obtain relief from the Commission's cost allocation rules, rather than imposing these same rules on ETCs which are not rate-of-return regulated. In addition, filing requirements for ETCs and LECs should be reduced to a level necessary for the Commission to meet its obligations under the 1996 Act.

B. Removal of Cost Allocation Rules.

Neither the 1996 Act nor the Rules contemplate subjecting ETCs to the complex cost allocation rules to which LECs like BellSouth are subject.[9] BellSouth believes that it

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[8] BellSouth is a price cap LEC, subject to price caps at the Federal level (having elected the no-sharing productivity factor), and at the State level as a result of the adoption of price cap regulation (without sharing) in the States within BellSouth's nine state Southeastern region. All remnants of sharing will be eliminated by December 31, 1997.

[9] BellSouth notes that Section 34 of the PUHCA reserves to the State commissions, the SEC and the FERC, jurisdiction over the non-telecommunications activities of rate-of-return regulated PUHCs. For example, Section 34(b) provides that State commission approval is required for the sale of assets to an ETC by its affiliated

is appropriate not to apply these inherently arbitrary rules to ETCs. However, it is essential that the Commission extend this approach to LECs like BellSouth which are subject to price cap regulation.[10] Cost allocation rules relate to the former rate of return regulatory regime which was based on accounting costs. The old direct relationship between costs and rates is not present in a price cap regime. Price cap regulation eliminates any incentive or ability to cross-subsidize unprofitable lines of business with the revenues of profitable businesses. The continued imposition of cost allocation rules on LECs is simply unjustifiable and inappropriate in today's price cap environment.

PUHC if such assets were included in the PUHC's rate base as of December 19, 1995. Section 34(f) provides that the SEC may require PUHCs to file information in connection with the activities of its ETCs if such activity is reasonably likely to have a material impact on the financial or operational condition of the PUHC's system. In addition Sections 34(g) and (h) impose certain conditions on the ability of PUHCs to provide financial support to its ETCs.

[10]BellSouth's view that cost allocation rules should be eliminated is based on its view that such rules are inherently arbitrary and, in any event, are inapplicable in a price cap environment. However, the regulated electricity and gas businesses of the PUHCs are not subject to price cap regulation. BellSouth's argument that price cap LECs and ETCs should be freed of burdensome cross-subsidy restrictions is not applicable to the regulated activities of the PUHCs. It is essential that the telecommunications industry not be tainted with the subsidization by PUHCs of the activities of their ETCs through the improper use of revenues generated by the their rate-of-return regulated businesses. Appropriate cross-subsidy safeguards should be adopted for PUHCs. For a more in-depth discussion of the need to eliminate cost allocation rules for price cap LECs, see Comments of BellSouth, In the Matter of Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Services, (CC Docket No. 96-112), filed May 31, 1996, which comments are incorporated by reference for inclusion in the record in connection with the Notice.

C. Reporting Requirements.

A central goal of the 1996 Act is the elimination of unnecessary regulation of the telecommunications industry, including the elimination of unnecessary reports to and filings with the Commission. The Commission has previously requested interested parties to comment on its proposals for the elimination of certain unnecessary filing requirements.[11] In its comments, BellSouth urged the Commission to eliminate a wide range of reports which it believes are no longer justified in light of price cap regulation, the lack of evidence of improper actions on the part of LECs and/or the lack of utility of certain reports.[12] BellSouth restates its view that the Commission should continue to study means of streamlining regulation through the elimination of unnecessary, duplicative and outdated reporting requirements.

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[11] See In the Matter of Revision of Filing Requirements, CC Docket No. 96-23, Notice of Proposed Rulemaking, released February 27, 1996.

[12] See BellSouth Comments, In the Matter of Revision of Filing Requirements, CC Docket No. 96-23, Notice of Proposed Rulemaking, filed April 8, 1996. In its Comments, BellSouth recommended the elimination of, inter alia, BOC Enhanced Service Nondiscrimination Reports and Affidavits, in large part because of the lack of any complaints of discriminatory behavior and the undue administrative burden imposed in filing such reports. BellSouth also recommended a review of the frequency and necessity for the filing of all ARMIS reports in light of the ARMIS reporting requirements contained in Section 402(b)(2)(B) of the 1996 Act. In particular, BellSouth recommended that ARMIS Reports 43-01, 43-02, 43-03 and 43-04, as well as Report 495A/B should be eliminated, largely because these reports have no relevance in a LEC price cap environment not subject to a sharing requirement. BellSouth Comments, at 6. See also, BellSouth Comments, In the Matter of Improving Commission Processes, PP Docket No. 96-17, Notice of Inquiry, filed March 15, 1996.

Just as it is inappropriate and unnecessary to burden LECs with reporting requirements, reporting requirements imposed on ETCs should be kept to a minimum. Section 401 of the 1996 Act mandates regulatory forbearance by the Commission under circumstances where enforcement of regulation is not necessary to ensure nondiscriminatory behavior, for the protection of consumers or in the public interest.[13] In order to make these determinations, it is necessary for the Commission to be informed as to the status of the development of competition in the relevant market. Section 402 of the 1996 Act further requires the Commission to conduct biennial reviews of its regulations and to repeal any regulation which is "no longer necessary in the public interest as the result of meaningful competition between providers of [a telecommunications] service."[14]

ETCs should only be required to file reports with the Commission which enable the Commission to fulfill its obligations under Sections 401 and 402 of the 1996 Act. These reports should include only objective information concerning the status of the development of the ETCs' businesses in order to enable a determination by the Commission as to the state of competition in the relevant market. Included in the information contained in these reports should be the status of the facilities constructed and utilized by the telecommunications providers (including for example, the number of miles of fiber laid) and information concerning the customer base, expenses and revenues of the

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[13] See 1996 Act, § 401(a). Section 401(b) provides that in making a determination concerning the public interest , the Commission is required to "consider whether forbearance ... will enhance competition among providers of telecommunications services."

[14] See 1996 Act, § 402(a)(2). See also the discussion of Section 706 of the 1996 Act at footnote 17, infra.

entity.[15] Market entry by these entities will result in the relevant markets being effectively competitive. The Commission must require ETCs and other telecommunications providers to provide the above information in order for the Commission to be in a position to exercise its obligations to forbear and to eliminate unnecessary regulation, as contemplated in Sections 401 and 402 of the 1996 Act.

It is incumbent upon the Commission to engage in an ongoing reassessment of the viability of its regulatory reporting requirements. The Commission must eliminate unwarranted regulation which restricts the ability of all telecommunications providers to compete, including LECs and ETCs.

III. SPECIFIC COMMENTS

A. "[T]o be engaged" Requirement.

Section 34(a)(1) of the PUHCA, inter alia, requires an entity which desires status as an ETC "to be engaged" in the business of providing one or more of the services set forth therein[16] as determined by the Commission. In making the determination that the applicant is actually "engaged" in the provision of the relevant service, the Commission should take into account the underlying goals of the 1996 Act. In enacting this legislation, the clear intent of Congress was to facilitate and encourage facilities-based competition in the telecommunications industry. This underlying Congressional intent is evidenced

[15] In an increasingly competitive industry, it is not necessary or appropriate to require reports or filings relating to quality of service. Competition will reward those with high quality of service and penalize those who fail to meet customer expectations.

[16] The relevant services are set forth in § 5 of the Notice.

throughout the 1996 Act, including in the Section 271 provisions governing Bell operating company entry into the interLATA market[17] and in the Section 706 provisions concerning deployment of advanced telecommunications capability.[18]

In its comments to the applications of Entergy Technology Company and Entergy Technology Holding Company[19] for the grant of ETC status ("Entergy Applications"), BellSouth indicated that the "plain language" of the 1996 Act required that such an entity actually be engaged in the provision of the relevant service before the ETC designation

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[17] Section 271(c)(1)(A) of the 1996 Act provides that a necessary precondition to a BOC offering in-region interLATA service is that the BOC has entered into an interconnection agreement (approved under Section 252 of the Act) with a competing provider in each State within its region in which it wishes to offer interLATA service. For the purposes of this section of the Act, the service of the competing provider must be offered either "exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange facilities in combination with the resale of the telecommunications services of another carrier." If no such facilities-based provider has requested interconnection within a prescribed period of time, this requirement can be satisfied by a statement of terms and conditions approved pursuant to Section 252(f) of the Act. See 1996 Act, § 271(c)(1)(B).

[18] In enacting Section 706 of the 1996 Act, Congress expressly encouraged reductions in regulation to encourage infrastructure investment. Section 706(a) provides:

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

This Section clearly directs the Commission to move expeditiously to eliminate regulations that are inconsistent with infrastructure investment and the development of competition.

[19] See Entergy Technology Company, Public Notice (OGC released February 27, 1996)(File No. ETC-96-2) and Entergy Technology Holding Company, Public Notice(OGC released February 27, 1966)(File No. ETC-96-3).

could be effective.[20] BellSouth commented that any grant of ETC status should be "conditioned on the applicant actually engaging in one or more of the businesses set forth in Section 34(a)(1) of the [PUHCA]".[21] In its pre-Notice Order responding to the Entergy Applications ("Entergy Order"), the Commission indicated that the "language, purpose and structure of section 34" led it to conclude that an applicant was "'engaged in the business of providing' telecommunications or other covered activities if the entity was established for the exclusive purpose of providing such services at the time it filed its application with the Commission."[22]

The Commission misread the BellSouth comments in this portion of the Entergy Order. The Commission indicated that the BellSouth position would require that the applicant must actually be engaged in the activity "before they may apply for ETC status". The Commission believed that such an interpretation "would defeat the core purpose of section 34, as such an interpretation would force registered holding companies to begin operations before they could file for ETC status".[23] Contrary to the Commission characterization, the BellSouth Comments indicate that the appropriate approach for the Commission to adopt in the Proposed Rules is to require that the applicant be formed "for the exclusive purpose of providing [the relevant] services at the time it files its application with [the] Commission", but that the grant of the status as an ETC be conditioned on the

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[20]See Comments of BellSouth, filed March 11, 1996.

[21]BellSouth Comments at 3.

[22]See Entergy Technology Company, (FCC 96-163, released April 12, 1996) at ¶ 20.

[23]Id.

entity actually providing the relevant service within a reasonable period of time. Such an approach is urged on the Commission as being more properly in accordance with the "language, structure and purpose of section 34" and with the central underlying goal of the entire 1996 Act - the encouragement of facilities-based competition.

B. "Brief Description" of Activities Requirement.

In the Notice, the Commission proposed that "an applicant need only briefly describe its planned activities" in its ETC application. Indeed, this nebulous and imprecise requirement is contained in the Rule.[24] The Commission cites the "' exempt wholesale generator' paradigm of PUHCA section 32" in support of this proposition[25], yet fails to follow the precedent contained in the regulations promulgated by the FERC to implement Section 32 of the PUHCA ("EWG Regulations"). The EWG Regulations contain a listing of the information to be provided by an applicant which seeks the status of an EWG, which listing is more detailed than is contained in the Rules.[26]

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[24]See Notice at ¶ 9 and Proposed Rule at § 1.4002(a).

[25]See Notice at ¶ 9.

[26]See 18 C.F.R. §365 et seq., which provide, in relevant part [§ 365.3(a)(2)] that an applicant for EWG status must provide

> A brief description of the facility or facilities which are or will be eligible facilities owned and/or operated by the applicant, including:
>
> (i) The related transmission interconnection components;
>
> (ii) Any lease arrangements involving the facilities, including leases to one or more public utility companies; and
>
> (iii) Any electric utility company that is an affiliate company or associate company of the applicant.

In its comments to the Entergy Applications, the City of New Orleans ("New Orleans") indicated that it was appropriate and necessary for the Commission to follow the precedent of the EWG Regulations in assessing the adequacy of ETC applications.[27] As New Orleans argued, it is impossible for interested parties to undertake a meaningful review based upon the sketchy information included in the Entergy Applications, information which, it appears, would satisfy the standard contained in the Rules. The Commission rejected the arguments of New Orleans on the specious grounds that Section 34(a)(1) of the PUHCA contains no parallel concept to the "eligible facilities" concept contained in Section 79z-5a of the PUHCA. As the Commission wrote,

> [b]ut for the fact that the definition and qualification of an EWG itself hinges on the definition and qualification of 'eligible facilities', virtually the only content requirement for that application would be a representation that the applicant is engaged in the business of owning or operating eligible facilities and selling electric energy at wholesale.[28]

What the Commission failed to realize is that Section 34(a)(1) does contain a "parallel concept". An applicant's ability to apply for and obtain the status of an ETC hinges on the definition and provision of "telecommunications services" and the other services contemplated in the definition of ETC. It is these services which are the parallel to the "eligible facilities" concept and which must be described with more particularity than contemplated by the Rules.

At a minimum, the Rules should require that an applicant include (1) a description of the facilities which will be utilized in the provision of the described service, (b) an

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[27]See Notice of Intervention, Comments and Request for Modification or Rejection of Application of the City of New Orleans, filed March 11, 1996 at 6.

[28]Id.

indication of whether the facilities will be those of the ETC or its affiliate[29], and (c) an indication of which, if any, facilities will be owned by the PUHC (or its affiliates other than the applicant) with which the applicant is affiliated. These minimal and easily met requirements are consistent with and in furtherance of Congress' intent to encourage facilities-based competition in the telecommunications sector.

C. "Change in Circumstances" Requirement.

The Rules impose on an ETC the ongoing obligation to notify the Commission in the event there occurs any "material change in facts" which do(es) or could affect its status as an ETC. Under such circumstances, the ETC must either reapply for ETC status based upon such changed circumstances, explain in writing why the changed circumstances do not affect its status as an ETC or notify the Commission of its decision to relinquish its ETC status.[30]

Due to the language contained in Section 1.4007 of the Rules[31], it is assumed that interested parties will be able to file comments in connection with any new determination of ETC status. However, the Rules do not provide any opportunity for interested persons to comment in connection with any filing in which the ETC asserts that the changed

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[29]It is significant to note that the Commission indicated that a significant motivation of Congress in including Section 34(a)(1) was its recognition "that utilities in general have experience in telecommunications operations, as these companies already operate telecommunications systems for the operation and monitoring of electric generation, transmission and distribution for reliability purposes." Notice at ¶ 7.

[30]Proposed Rules at § 1.4006.

[31] §1.407(a) of the Rules provides that "[a] person wishing to be heard concerning an application for ETC status" may file comments with the Commission.

circumstances do not affect its ETC status. The Rules should be amended to provide a reasonable period of time (15 days) in which to file comments to any such matter. In addition, the Commission has not imposed a condition similar to those contained in Section 1.4006 of the Rules in connection with any pre-Notice order granting ETC status.[32] It is imperative that any entity which has already been designated an ETC be required to notify the Commission of any "material change in facts" which could affect its status as an ETC. Otherwise these ETC's would be free to engage in activities which, had they been disclosed to the Commission at the time of application, might have resulted in denial of the ETC status.

[32] The Commission notes that "[a]s of the date of April 25, 1995 (sic)" it had received 11 applications for ETC status and had granted three. Notice, ¶ 13. Also see Notice, footnote 22. Since that time, the Commission has granted NU/Mode 1 Communications, Inc. the status of ETC. See NU/Mode 1 Communications, Inc., ___ FCC Rcd ___, (FCC 96-863, Rel. May 30, 1996). It is noted that several affiliates of The Southern Companies filed for ETC status on April 16, 1996. See, for example, Southern Telecom Holding Company, Inc. Public Notice, DA 96-601 (OGC released April 17, 1996). It is further noted that Section 34(a)(1) of the PUHCA requires the Commission to act on an ETC application within 60 days following receipt. PUHCA, § 34(a)(1).

IV. CONCLUSION

The Commission is urged to address the concerns raised in these comments and to amend the Rules as requested for the reasons set forth above. With the requested amendments, BellSouth recommends that the Rules be adopted.

Respectfully submitted,

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